

CALIFORNIA STATE BAR  
OF THE STATE OF CALIFORNIA  
SAN FRANCISCO

In the Matter of:  
PUBLIC HEARING ON STANDARD  
SETTING STUDY AND PROPOSAL  
REGARDING CALIFORNIA BAR  
EXAMINATION PASS LINE

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TRANSCRIPT OF PROCEEDINGS  
TUESDAY, AUGUST 15, 2017  
180 HOWARD STREET  
FOURTH-FLOOR CONFERENCE ROOM  
SAN FRANCISCO, CALIFORNIA

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1 Tuesday, August 15, 2017 10:01 o'clock a.m.

2 P-R-O-C-E-E-D-I-N-G-S

3 CHAIR GOODMAN: Good morning. So today  
4 we're going to have our second of two public forums  
5 concerning the standard-setting study and the  
6 recommendations that we hope to make to the board of  
7 trustees at the end of this month.

8 My name's Karen Goodman. I'm Chair of the  
9 Committee of Bar Examiners, and today we're going to  
10 hear from the public concerning the proposals that  
11 we're considering.

12 To my immediate right is Gayle Murphy,  
13 director of admissions. Elizabeth Parker, our  
14 executive director, is taking her seat and will talk  
15 in a few minutes. Larry Sheingold, also on the  
16 committee, is here as well. Dolores Heisinger is here  
17 on behalf of the committee, and James Efting is here  
18 on behalf of the committee.

19 So thank you all for coming today. We spent  
20 yesterday down in Los Angeles and heard a great many  
21 of very interesting public comments concerning the  
22 issue that we're really facing. And the one that  
23 we've been asked to work on this year and to come up  
24 with a recommendation, and that is do we adjust the  
25 cut score for the Bar exam at this time or keep it the

1 same, 1439.

2 So, just in the background, we've identified  
3 a problem, and that was a decline in the pass rate  
4 from 2008. The Committee of Bar Examiners, whose task  
5 is overseeing admissions for the State Bar of  
6 California, we've authorized several studies. One was  
7 the recent performance changes of the committee --  
8 with the California Bar examination that was done by  
9 Roger Bolus. Most of you should have seen that.

10 We then did a standard-setting study that  
11 was released last month, which went through a -- what  
12 was done with 20 lawyers in terms of evaluating test  
13 exams for the July 2016 Bar examination. We're in the  
14 process of working on a content-validation study and  
15 we're also working on a law-school performance study.

16 The issue for public comment, which is the  
17 reason that we're here today, are July 31st, two  
18 proposals. Number one, starting interim reduction of  
19 the Bar exam starting in July 2017 to 1414 or leave it  
20 at -- I think it's at 1440. Those are the two  
21 recommendations that went out for public comment. And  
22 we're in the middle of public comment right now.  
23 We've had an overwhelming response with -- from the  
24 website in terms of comments about the two  
25 recommendations.

1           So the process really will be -- and we're  
2           hearing comments. People have identified themselves  
3           in advance as to speaking. So I will call them up.  
4           When you're asked to come up, state your name just  
5           like you would if you were in a deposition, so that  
6           people know who you are.

7           And then certainly try to keep your comments  
8           to these proposals -- I mean, we're interested in a  
9           lot of different things, but in terms of time, it's  
10          most productive to focus on the studies that have come  
11          out and your views on the two proposals. That's what  
12          will inform us most appropriately before we make a  
13          recommendation in late August.

14          And then after we make the recommendation,  
15          I'll present that recommendation to the board, who  
16          will then present the recommendation to the Supreme  
17          Court.

18          So, with that, Elizabeth, do you have some  
19          other comments?

20                 MS. PARKER: Thank you. Thank you very much  
21                 and for the good work that you've been doing and to  
22                 all these that are going to participate.

23                 I wanted just to say a word. You've  
24                 mentioned the four studies. I'd like to say just a  
25                 little bit about the pass-line study, which I think

1 everyone should understand, of course, it's going to  
2 provide important data which the Supreme Court will be  
3 considering as it determines what happens, what would  
4 be appropriate for those who are licensed as attorneys  
5 in California in order to ensure public protection.  
6 But there will other factors as well that will be  
7 considered and relevant to the Court's review.

8 Even so, I think the significance of the  
9 pass-line study makes it important to understand the  
10 process that was employed for designing and  
11 implementing the studies. The six considerations I  
12 think are relevant to understanding the way in which  
13 the study was created and emphasizes the fact that it  
14 was independently and professionally conducted.

15 But first, the pass-line study commissioned  
16 by the State Bar was undertaken by a nationally  
17 recognized independent expert consultant, Dr. Chad  
18 Buckendahl. Dr. Buckendahl acted independently and  
19 according to standards recognized by the National  
20 Psychometric community.

21 Second, the design which Mr. Buckendahl used  
22 for the pass-line study was based on the analytic  
23 methods. The principal method recognized by the  
24 psychometric community is appropriate for standard  
25 setting and professional licensing exams.

1 Third, Dr. Buckendahl's implementation of  
2 the study was conducted, critiqued, and validated by  
3 two recognized national and state outside experts.  
4 The state expert actually is the head of this  
5 activity, for the Consumer Affairs Department.

6 Their comments critiquing the  
7 implementation of the study will be forwarded to the  
8 Court. We agreed, notwithstanding some differences in  
9 expert opinions about technical issues, each found  
10 that the study was conducted in a way consistent with  
11 accepted psychometric standards.

12 Fourth, the State Bar and Dr. Buckendahl  
13 went to considerable effort to ensure that there was  
14 continuing stakeholder consultation and input during  
15 the process of developing the study. The development  
16 of the study then proceeded with transparency.

17 And fifth, neither the staff of the State  
18 Bar have memories of this committee or the admissions  
19 and education committee or the board of trustees  
20 themselves have been involved in the design of the  
21 study. The role of staff has been to assist in the  
22 implementation of the study under direction of  
23 Dr. Buckendahl.

24 And sixth, and finally, the 20  
25 subject-matter experts, or SMEs, who participated in

1 the pass-line study and were charged with the  
2 responsibility of reviewing and assessing answers to  
3 questions on the 2016 Bar exam were selected by the  
4 Supreme Court from nominations by all stakeholders,  
5 and that included, then, our legislative oversight  
6 bodies, the office of the governor, committee of Bar  
7 examiners, and law school deans as well.

8 The resulting SMEs represented is the first  
9 and a balanced group of practitioners and educators  
10 drawn from all stakeholders. And their geographic  
11 regions of the state were also diverse, as were they  
12 themselves.

13 So I think, then, the independence of the  
14 pass-line study and its conduct should not be endowed.  
15 Not everyone will welcome the results of the study,  
16 but the way in which it was created and implemented I  
17 believe should not be questioned.

18 CHAIR GOODMAN: Good. Thank you very much.

19 So with that, can we have Andrew Waters? Is  
20 he here? No. Okay. Signed up and then didn't make  
21 it.

22 MR. PHILLIPS: Andrew Phillips.

23 CHAIR GOODMAN: Great.

24 MR. PHILLIPS: I'm Andrew Phillips. I  
25 was -- I was one of the panel members, one of the 20.



1 They took 20 people, all of whom had passed the Bar  
2 exam with a score of 144 or above. They gave them a  
3 few --

4 CHAIR GOODMAN: Is your mic up?

5 MR. PHILLIPS: No. Okay. I'll back up.  
6 I'm Andrew Phillips. I was one of the 20 panel  
7 members. They took 20 people, all of whom had passed  
8 the Bar exam with a score of 144 or above. They gave  
9 them a few giant stacks of paper and asked them  
10 quickly to divide them into two files: competent or  
11 not competent.

12 The panel had no rubric, no scoring matrix,  
13 nothing but their own judgment to rely upon. Other  
14 than ancient memories of law school, the only measure  
15 of competency for these exam answers were to compare  
16 one to another. It was no surprise that the outcome  
17 was consistent with the current cutoff, pretty much  
18 right down the middle.

19 The Ph.D. experts hired to shepherd the  
20 process issued reports citing concerns about the  
21 validity of the study; in particular, not having a  
22 rubric or a matrix.

23 But both of these reports were issued after  
24 the current recommendation had already been submitted  
25 to public comment. So what does 144 or 141.4 actually

1 mean compared to New York's 133 or our next-door  
2 neighbors, Nevada's, current move to 138? It means  
3 only that California excludes more people from the  
4 practice of law. When questioned about the safety of  
5 the public in New York versus the safety of the public  
6 in California; i.e., do New York lawyers, who score  
7 below 144 harm the public more? We get no answer.  
8 When asked whether there's a correlation between lower  
9 passing Bar scores in California and attorneys  
10 disciplined for incompetency in California, we get no  
11 answer. That's because we can't find any correlation.

12           The California State Bar examination is now  
13 a reading contest for those who possess strong  
14 comprehension and analysis skills but take just a few  
15 seconds longer to read a paragraph, the Bar exam  
16 becomes crushingly more difficult. I recall being  
17 told that if I get to the end of the MBEs and I -- the  
18 end of the time for the MBEs and I run out of time,  
19 take a few minutes and just fill in the bubbles. I  
20 have to say that as a practicing attorney, both in  
21 private practice and as in-house counsel, nobody has  
22 ever expected me to just "fill in the bubbles." It  
23 shouldn't be about time; it should be about  
24 competency.

25           Who is excluded by the unnecessarily high

1 cutoff? You can see that by lowering the cut score by  
2 2.6 points to curve a recommendation, which is a mere  
3 1.8 reduction from the 1440, the increase of the  
4 inclusion of people of color is much more than of  
5 whites, the California accredited schools are impacted  
6 at a rate of four times that of the ABA schools. Why  
7 is that? Income? Ability to pay or borrow? Need to  
8 work and go to school at the same time? Family  
9 obligations? Ethnic and socioeconomic reasons? Pick  
10 your favorite logistic.

11 Reducing the cut score from 144 to 141.4  
12 might politically be a move in the right direction,  
13 but it doesn't go nearly far enough. The claim that a  
14 cut score below 144 creates an unreasonable risk to  
15 the public is not backed by any true evidence  
16 California should entertain options between 133 and  
17 139 to open the doors to more truly competent people  
18 and bring legal services to more diverse California  
19 communities. Thank you.

20 CHAIR GOODMAN: Thank you very much.

21 So our next speaker, Lorin Kline.

22 MS. KLINE: Good morning.

23 CHAIR GOODMAN: Good morning.

24 MS. KLINE: My name is Lorin Kline. I'm an  
25 attorney with the Legal Aid Association of California.

1 We represent nearly 100 legal-aid nonprofits that  
2 serve individuals and counties all across the state of  
3 California.

4 I'm here this morning to ask you to please  
5 consider this issue and the State Bar's mission of  
6 public protection through the lens of the enormous  
7 justice gap that California is facing right now.  
8 There's an unprecedented number of low-income people,  
9 people with disabilities, and seniors that aren't  
10 getting the legal services that they need. And those  
11 people will be impacted by your decision here today.

12 So on that note, I wanted to raise three  
13 access-to-justice concerns that we have that council  
14 against going with the first option of keeping the  
15 pass score at the status quo.

16 First, keeping a high pass score  
17 disproportionately impacts low-income people. Taking  
18 the Bar exam costs money, and the Bar prep courses  
19 have become ubiquitous. There are some scholarships  
20 available, but they're very limited.

21 So people that are forced to pay for Bar  
22 prep courses on top of their huge law-school debt, and  
23 then having to think about taking the exam a second  
24 time are just being cut out. The low-income people  
25 are not getting an equal opportunity to take and pass

1 the exam.

2 Second, having a high pass score affects how  
3 legal aid hires. The primary way that legal aid hires  
4 new lawyers into their offices are through fellowship  
5 programs. They're usually one year, sponsored by a  
6 law firm or some other entity. And when you have a  
7 one-year fellowship, if an attorney doesn't pass the  
8 Bar exam, that means that for almost the entire tenure  
9 of their fellowship they can't practice law and serve  
10 clients, which is forcing legal-aid organizations to  
11 redesign these programs. Not as many clients are  
12 getting served, and it's creating a big problem in  
13 terms of hiring for legal aid.

14 Also, legal-aid programs in rural areas have  
15 let us know that they're having a very hard time  
16 hiring because the pool of eligible applicants is  
17 shrinking. With the exception of maybe U.C. Davis,  
18 most accredited schools are not in rural areas. So  
19 rural programs recruit attorneys from California  
20 accredited schools. But many of these schools have  
21 lower pass rates, which means the pool of potential  
22 hires in rural areas is really shrinking.

23 Lastly, having a high pass score affects who  
24 Legal Aid hires. Legal Aid always tried to recruit  
25 the Chinese from the communities that it served. They

1 make a big effort to recruit women, to recruit people  
2 of color, to recruit people that speak languages other  
3 than English. And they generally do a good job at it.  
4 Whereas the legal profession as a whole is not  
5 particularly diverse, the legal aid community is very  
6 diverse. About half of legal-aid lawyers are people  
7 of color. Two-thirds of legal-aid lawyers are women.  
8 And we can't ignore the fact that women and people of  
9 color generally have a lower pass score. So that  
10 again really impacts how legal aid can recruit, who  
11 they can recruit, which is a really important concern  
12 for Legal Aid.

13 Lastly, I just wanted to let you know we  
14 submitted these comments in more detail in writing.  
15 Our Executive Director, Selena Copeland (phonetic),  
16 testified before the Assembly Judiciary Committee  
17 about these issues, and also gave more information, if  
18 you're interested in learning more.

19 In closing, I just wanted to say that we  
20 definitely agree that public protection is very, very  
21 important, but perhaps we should consider that just  
22 taking lawyers at a high pass score is not the best  
23 way to meet that mission. Public protection can be  
24 approved by increasing services to low-income people  
25 and by ensuring that the legal community is diverse

1 and matches a lot of the people that are in need of  
2 services. Thank you.

3 CHAIR GOODMAN: Thank you very much, Lorin.  
4 So our next speaker, Ivan Mendoza.

5 MR. MENDOZA: Good morning.

6 CHAIR GOODMAN: Good morning.

7 MR. MENDOZA: My name is Ivan Mendoza. I'm  
8 a son of Mexican immigrants, a juris doctorate of  
9 Southwestern Law School, a former juvenile delinquent,  
10 a resident of juvenile detention centers who earned a  
11 bachelor's degree from the University of California at  
12 Berkeley.

13 Prior to law school, I worked as a paralegal  
14 for seven years. In that time I worked in three  
15 different law firms. One law firm -- one large law  
16 firm -- litigation law firm here in San Francisco;  
17 second, as the in-house paralegal to a global  
18 medical-device company in Sylmar, California; lastly,  
19 for a large workers' compensation firm in Northern  
20 California.

21 So what does my personal information have to  
22 do with this matter? Today I present the case in  
23 favor of lowering the Bar cut score. I use my own  
24 experience to support the relevant factors used by the  
25 community to determine the appropriate Bar cut score.

1 Because not only is my experience unique, it also  
2 represents both what the average person in my  
3 community experiences and what it systematically does  
4 not experience.

5 The majority of my community experiences  
6 were many systematic inequities, like incarceration,  
7 poverty, lack of education, and gross disparity in the  
8 Bar passage rate and in the practice of law. I am a  
9 representative of my community's concerns in which the  
10 Bar community should use to factor into their decision  
11 lowering the cut score, even lowering that cut score  
12 from the 1414 proposition.

13 The Bar community has determined that the  
14 following seven factors are relevant to making this  
15 determination while increasing the diversity of the  
16 attorneys; two, increasing the access of legal  
17 services for underserved populations; three, the fact  
18 that the cut score in California is the second highest  
19 in the nation; four, it maintains the integrity of the  
20 nation; five, protecting the interests of the public  
21 from potentially unqualified attorneys; six, the  
22 declining bar-exam pass rates in California; and  
23 seven, the burden of student-loan debt from law school  
24 to law school.

25 And less today are against people of color.



1 The issues central to my thesis is restorative  
2 justice, specific things through the diversity in the  
3 profession, competency of attorneys in practice to  
4 underserved populations, furthering the access to  
5 legal services to those underserved populations, and  
6 the integrity of the profession to serve that diverse  
7 array of clients.

8 Further, because the emphasis on these  
9 doctrines will sway the community to lower the cut  
10 score, to protect the interests from unqualified  
11 attorneys who are averse to the needs of the diverse.

12 Currently there are 249,696 -- 249,696  
13 attorneys, including judges, in California. Latinos  
14 make up 6.5 percent of California's licensed  
15 attorneys. That means there is a staggering 32.5  
16 percent disparity between Latinos -- Latino lawyer  
17 representation in the State Bar, and in the general  
18 Latino population.

19 This gap or canyon, if you prefer, is  
20 unacceptable, especially when you consider that  
21 Latinos are overrepresented in California in jails and  
22 prisons. Of course, to be fair, with any major  
23 population shift there's an adjustment or catching-up  
24 period. Where after a surge of population in a group,  
25 it takes time for members of that group to reach all

1 areas of the populace.

2 But Latinos have represented merely one  
3 fifth of California's population, and that was back in  
4 1980. And in 2014 Latinos only represent 6.5 percent  
5 of lawyers. Justice and fairness demands that we do  
6 better. If diversity is a top factor in lowering the  
7 cut score, then 6.5 percent of the Latino lawyers are  
8 conclusive to move for a systematic change in the cut  
9 score in order to correct the historical inequities.

10 Nevertheless, according to California  
11 Governor Jerry Brown's new state budget, Latinos are  
12 the largest single racial ethnic group in the state,  
13 making 39 percent of the state's population. But that  
14 would appear that diversity is seriously lacking in  
15 the legal practice. Therefore, because California's  
16 cut score is the second highest in the nation, it only  
17 perpetuates this professional diversity lessens the  
18 chances of nearly half of California residents from  
19 practicing law.

20 As attorney -- an attorney has a duty to  
21 render a competent service to their clients. They  
22 maybe define the competence as using the legal  
23 knowledge, skill, thoroughness and preparation, which  
24 the reason is necessary for their representation.

25 Areas of law that are currently important --

1 that currently are important and will remain of  
2 interest, especially at least for the next 40 years,  
3 are in criminal law, criminal procedure, immigration,  
4 and workers' compensation. Because our forms are  
5 grossly represented in these areas. Competent  
6 representation is vital to their cases. Clients are  
7 not fact sheets; you need to be creative. Leave out  
8 an exam. Or once an issue spot, apply roles and make  
9 an analysis and conclusions. Clients must be helped  
10 to organize thoughts and facts. Competency is not  
11 only knowing the law, but knowing the client, his or  
12 her client facts, obtaining full transparency through  
13 the client's trust. What does apply in this trust an  
14 attorney lacks most integral parts and pieces of the  
15 case to competently represent their clients.

16 As an experienced paralegal, who has worked  
17 on several cases in these areas, the majority of my  
18 supervising attorneys would not have a prepared fact  
19 file as thoroughly as it was if it wasn't for my  
20 background, my understanding of the clients who  
21 represented these statistical numbers.

22 Furthermore, let specifics speak for  
23 themselves when it comes to the disparity of numbers  
24 of Latinos who are in prison, immigration proceedings,  
25 and worker compensation claims. Therefore, it is

1 vital that the 40 percent of California's population  
2 be competently represented by competent attorneys who  
3 can relate their particular cases, experiences, and  
4 situations.

5 We're arguing that the majority of  
6 Californians, both citizens and undocumented people,  
7 lack the access to legal services. Upon graduation,  
8 law school stressed in parts of becoming the voice of  
9 the voiceless. The ABA actively promotes pro bono  
10 work for indigent people in criminal proceedings. And  
11 according to our report on the California Coalition  
12 for -- the California Commission for Universal  
13 Representation just in the area alone, in immigration  
14 law alone, 60 percent of detained immigrants in  
15 California are unrepresented.

16 Furthermore, the data shows that for  
17 immigrants who have counsel exceeded more than five  
18 times as often as did their unrepresented  
19 counterparts. There were approximately 7,400 detained  
20 and unrepresented immigrants who had their case in  
21 southern California and immigration courts in 2015.

22 As a law clerk for both immigration and  
23 criminal-law matters, I saw firsthand people who could  
24 not afford a lawyer or who were representing  
25 themselves because they distrusted a court-appointed

1 attorney. Access to proper legal representation is  
2 the most important fundamental right there is, even in  
3 immigration where having an attorney is not a right.

4 Therefore, it is vital that the 40 percent  
5 of California's population be properly represented by  
6 attorneys and continue to be open to representation.

7 To finish, the integrity of the  
8 profession -- the word "integrity" evolved from the  
9 Latin adjective "integer," meaning whole or complete.  
10 In this context, integrity is the inner sense of  
11 wholeness, deriving from the qualities such as honesty  
12 and consistency with character. And ethics integrity  
13 is regarded by many as honesty and truthfulness or  
14 accuracy of one's actions.

15 Law schools, law firms, the State Bar pride  
16 themselves on serving diverse people and including  
17 diverse people as attorneys. However, the numbers are  
18 not representative of this objective. As stated,  
19 Latinos are only 6.5 percent in a state where 40  
20 percent of the public is Latino.

21 Because in every demand that we must be  
22 honest, the current state of the profession is not.  
23 When half the state is represented by a single-digit  
24 number, there's no wholeness in the profession. The  
25 committee must be honest, reassess the situation. If

1 it decides to continue on the same path, it would have  
2 a risky effect -- half the student population both are  
3 participating in the legal realm and assets to legal  
4 representation, but underserved communities.

5 Therefore, the profession demands that the cut sheet  
6 be lowered in order to preserve the whole of the  
7 profession.

8 In conclusion, as a representative of the  
9 Latino community, I am calling on the community to  
10 restore justice and equality to the legal community.  
11 Way too long have our voices not been heard, nor have  
12 we as people been properly represented in the courts.  
13 If we continue down the same path of declining  
14 bar-passage rates, we will soon see depleted numbers  
15 of diverse attorneys. The lower the number of  
16 diversity, the more risk of incompetency of  
17 representation, less access to legal representation  
18 and less integrity of the profession there will be. I  
19 urge the committee to move for progressive change,  
20 restorative justice, and to move forward in lowering  
21 the cut sheet. Thank you very much.

22 CHAIR GOODMAN: Thank you, Ivan.

23 So our next speaker is Elizabeth -- the last  
24 name Xyr.

25 How do you pronounce that?

1 MS. XYR: Xyr. Yeah, it's a little funky.

2 CHAIR GOODMAN: Good morning, Elizabeth.

3 MS. XYR: Good morning. Just on the record,  
4 my name is Elizabeth Xyr. I'm the associate dean of  
5 Monterey College of Law, and I was an observer at both  
6 the standard-setting study and the content-validation  
7 study.

8 Based on my observations, my review of the  
9 study itself and the independent consultant reports, I  
10 urged the committee to establish a minimum passing  
11 score of 139, 1390, for the California State Bar exam.

12 As Dr. Buckendahl identified, 139, 141, and  
13 144 have substantially similar levels of validity.  
14 139 maintains validity while also taking into  
15 consideration some of the challenges and outliers  
16 involved in the studies themselves.

17 There are a number of reasons that I support  
18 a minimum passing score of 139, but I'm only going to  
19 address three issues today.

20 Regarding the minimum competency standard  
21 and how it was delivered and trained for the panelists  
22 to ask the standard-setting studies. As Dr. Amaris  
23 (phonetic), one of the independent consultants  
24 identified, the panelists were given the definition  
25 and they were trained on how to use it, but there was

1 a considerable amount of confusion and inconsistency  
2 during that process. There were a number of  
3 questions, there were a number of panelists that were  
4 unsure how it would be implied once it was brought  
5 into the essays that they would then review.

6 Once the essays were put in front of the  
7 panel, there was a considerable amount of confusion.  
8 And the confusion was increased because they did not  
9 feel that they were qualified in the actual review  
10 process.

11 Dr. Buckendahl also points out that the  
12 standard itself was unclear because they have no  
13 context for the kind of information that a strong  
14 response would contain. And as a result, they may  
15 have introduced their own idiosyncratic views and  
16 ideas onto the project.

17 This is considered a standard and  
18 appropriate measure in other professions for standard  
19 setting; however, I believe that the unique nature of  
20 the law requires and would have been better served by  
21 providing a different approach. Dr. Petoniak  
22 (phonetic) acknowledges that this increased the  
23 likelihood of individual interpretation and skewed  
24 results in this part of the study.

25 Regarding the MBE exclusion within the



1 standard study and constant valuation study, the  
2 questions were left out of those studies. And  
3 Dr. Buckendahl controlled it through equivalent  
4 percentile rating. However, as discussed at the  
5 validation study, the MBE's format and content poorly  
6 assesses the newly developed definition of men of  
7 competency.

8 Since the MBE portion of the exam now makes  
9 up 50 percent of an applicant's score, I feel that the  
10 further use -- this further justifies the use of 139  
11 as the minimum competency score.

12 I trust this will be further discussed once  
13 the report for the content validation study is  
14 released.

15 My last issue is regarding the control of  
16 outliers and participation bias. Drs. Buckendahl and  
17 Petoniak both assert that the use of the median  
18 combined scores is appropriate because it controls for  
19 outliers in the scoring process. I assert that it  
20 also controls the bias inherent in the participants  
21 themselves and in the process.

22 Dr. Petoniak and the panelists' evaluations  
23 and my own observations mention that some of the  
24 participants overtook the process itself, and some of  
25 their background and personal bias may have influenced

1 other participants. Use of the 139 score will help  
2 control not only to the outlying scores but also for  
3 any undue influence those participants may have had on  
4 other panelists.

5 In sum, 139 maintains validity while  
6 controlling for errors for the panelists' bias and for  
7 the assessment format itself. This will protect the  
8 public, this will affect applicants appropriately, and  
9 it will reduce the undue financial burden established  
10 by an unnecessarily high test score.

11 CHAIR GOODMAN: Okay. Thank you very much,  
12 Elizabeth.

13 So our next speaker is Greg Brandes.

14 MR. BRANDES: Good morning, everyone. Greg  
15 Brandes.

16 CHAIR GOODMAN: Good morning.

17 MR. BRANDES: First of all, thank you for  
18 hearing from me again on these issues. Also, it's  
19 terribly important to comment and note the -- that I  
20 really appreciate you holding hearings. I think it's  
21 really important that we respect the role of the  
22 committee in this process and I think the committee  
23 should be the one gathering information and making  
24 recommendations and making decisions about this  
25 matter. So I speak today really to the members of the

1 committee and the Bar examiners. And of course, I  
2 understand the Court will probably read it as well.

3 And I just bring you news from the field, as  
4 it were. On July 31st, I offered the opinion that the  
5 challenge with the Bar exam as it's presently  
6 constituted isn't -- that it's not doing something  
7 useful. It's doing something useful, it's just not  
8 doing what's really about public protection. In other  
9 words, we're testing sort of academic things, skills  
10 things, and they don't go to the matters that actually  
11 cause lawyers to do things that harm the public.

12 Those things are things like failing to  
13 follow through on matters, mishandling money, not  
14 keeping clients adequately informed. If you listed  
15 all the top 25 things that a person would be  
16 disciplined for, very few items on that list would  
17 have any connection to the Bar exam.

18 So I suggested at that time that the Bar  
19 exam, as presently constituted, is a poor instrument  
20 for actually engaging in public protection.

21 So recently I, since I spoke with you last,  
22 had the opportunity to spend some time at the  
23 Southeastern Association of Law Schools annual meeting  
24 and attend a panel on the effect of the Bar exam on  
25 law-school curriculum. Let me just set the stage for

1     you a little bit.

2             Barry Currier, who I think everybody knows,  
3     managing director of accreditation for the ABA. Dean  
4     Chris Pietruszkiewics, who's dean of status in law  
5     school and serves on the standards review committee  
6     for the ABA. And John Barry, who is essentially the  
7     chief trial counsel of the Florida Bar, the chief of  
8     the division that does lawyer discipline in Florida,  
9     and it's his presentation I want to share with you.

10            Mr. Barry's point, because this was about  
11    how the Bar exam influences law-school curriculum, was  
12    that law schools need to do a much better job of  
13    teaching students about the things that get them in  
14    fact in trouble with disciplines with the Bar. And so  
15    he listed the predictable things, some of which I  
16    mentioned before, and indeed his entire list was all  
17    the sorts of things that also are not tested on the  
18    Bar exam.

19            So I had the chance to ask him after  
20    the main session a couple of questions. And I asked  
21    him, So in your research, how many people did you come  
22    across who had been disciplined for lack of  
23    substantive law knowledge in a bar-exam subject? How  
24    many people that you ever ran across have been  
25    disciplined for poor critical-thinking skills? Or for

1 weak factual analysis? Or for slow typing, for that  
2 matter, because the Bar exam does in fact have an  
3 element of that as part of the challenge.

4 And I want to quote you what he said -- what  
5 he actually said in the record. He said, At close to  
6 zero as it is possible to calculate, which I'm not  
7 exactly sure what he meant by that, but something like  
8 zero.

9 So back to the point; right? I would guess,  
10 having attended a lot of board of trustees meetings  
11 here in California and heard the reports of the office  
12 of trial counsel that the same answer would apply here  
13 if we did the same research. The things on the Bar  
14 exam just don't come up with respect to that  
15 mechanism.

16 And so it becomes a poor argument for a very  
17 high cut score to say simply, Well, we're sort of  
18 testing for those things because people have to study  
19 hard and follow through to the other Bar exam. That's  
20 a poor argument for a really high cut score. And we  
21 need these people.

22 And her testimony about various aspects of  
23 it from the diversity standpoint, I want to make the  
24 point that the skills that matter for public  
25 protection, not testing on the Bar exam, are skills

1 these people who are being excluded pass. They've  
2 been through three years of law school, countless  
3 hours of peer evaluation by expert peers over all that  
4 period of time who have determined that they have  
5 adequate skills to serve the legal -- to be members of  
6 the profession and serve the public. They've passed  
7 the NPRE with the highest required score in the  
8 country.

9 UNIDENTIFIED MALE SPEAKER: Equaled only by  
10 Utah, if I recall correctly.

11 MR. BRANDES: And they've passed the State  
12 Bar's very vigorous moral-character investigation.  
13 The Bar exam isn't testing that they know how to  
14 follow through, that they will keep their clients  
15 informed, that they will handle money properly. It's  
16 not even on there. And those skills are the skills we  
17 need for them to have, and yet they can't practice law  
18 maybe because they don't type as well in English as  
19 the person next to them.

20 So I think it's a very important move the  
21 State Bar has done to consider the Bar exam very  
22 carefully. I appreciate the effort and the work  
23 that's being put into the studies. I certainly  
24 appreciate the thoughtful way in which the committee's  
25 approaching in making the decision. And I'd urge you

1 to consider going a lot lower than you have. In order  
2 to -- we could take account of the fact that this exam  
3 does not very well predict the many, many critical  
4 skills that we need members of the Bar to have.

5 Thank you again.

6 CHAIR GOODMAN: Thank you, Greg.

7 So our next speaker here is Arti Denterlein.

8 I may have missed that.

9 MS. DENTERLEIN: I'm actually a Bar taker.  
10 I'm a student, so --

11 CHAIR GOODMAN: Can you state your name,  
12 though?

13 THE REPORTER: Could you spell it for me  
14 too, please?

15 MS. DENTERLEIN: D-e-n-t-e-r-l-e-i-n.

16 I have taken the Bar a few times. I haven't  
17 passed. I just took it last month. I am coming from  
18 a personal experience, which is kind of would be a  
19 little bit different from what everyone else is  
20 discussing. So bear with me, and this is what I think  
21 what the problems are. I find that perhaps people are  
22 forgetting we have a lot more material to cover  
23 nowadays than there was before.

24 We have to study federal evidence, we have  
25 to study California evidence that wasn't there before

1 a few years ago. We have to study California civil  
2 procedure, we have to study federal civil procedure.  
3 We have to study ABA professional responsibility, we  
4 have to study California professional responsibility.  
5 We have a lot more materials to cover. And I added it  
6 up. We have 18 subjects that we have to study.

7 Okay. Now, I have taken the U.S. Patent Bar  
8 exam a few times, but I have passed. But I haven't  
9 been able to pass the California Bar, and some of my  
10 opinions that I'd like to present to you, which is  
11 just, like, are different from what the other people  
12 have spoken to you. I find that the grading itself is  
13 highly inconsistent. The grading is very subjective.  
14 So it doesn't matter how low or how much you lower the  
15 cut score. As long as the grading remains for  
16 subjective, it's not going to get very much different  
17 or better results.

18 So I find that one set of -- one group of  
19 people had written the questions and another group of  
20 people are grading them. I don't know what -- how  
21 they communicate with each other. And if I were to  
22 write an essay, if I were to give it to you -- all ten  
23 of you right now, I'm pretty sure I'm going to get ten  
24 different scores.

25 So what I'd like to present to you in my



1 personal experience is that inconsistent grading is  
2 causing a lot of problem for us. California requires  
3 a lot more analysis in our essays and performance  
4 tests than most of the other jurisdictions. They  
5 don't require that much analysis.

6 So what that's my -- okay. I also find that  
7 the cut rate should be in line with the two-day Bar  
8 exam in jurisdictions like other states, like New  
9 York. New York Bar is also known to be very hard, as  
10 hard as California, but their pass rate is higher.  
11 It's always been two-day exams, not like three day.

12 So I have experience of taking the three-day  
13 exam and also the two-day exam that I just took a  
14 month; okay? What I found, though, it is a two-day  
15 exam, whether it was intended or not the questions are  
16 a lot harder; okay? So I found that their  
17 questions -- this is all over the place, there's no  
18 way I can finish these questions all within one hour  
19 like that. So my request to you is that just because  
20 it's a two-day exam, please don't make it more  
21 difficult than the three-day exam; okay?

22 And also, in most jurisdictions, if you have  
23 passed the MBE, you don't have to retake it if you  
24 fail the Bar. In California, you could be doing  
25 stellar MBE performance, but if you failed your essay

1 portions, you have to take the entire exam all over  
2 again, which I think is very unfair.

3 Also, the published answers from California  
4 Bar site, that is our guideline. We follow the  
5 published answers that this is how we should write.  
6 But this is generally known to all students that  
7 there's no way a student wrote these essays under time  
8 constraint and under pressure of the Bar exam. So if  
9 you look at this, the published answers are, like,  
10 pages and pages and pages of -- covering every issue  
11 in the world. There's no way somebody can write like  
12 that under the time constraint.

13 So it needs to be transferred to where did  
14 these model answers come from? Who wrote them? And  
15 we believe that those are written not under time  
16 constraint but written by some experienced lawyers,  
17 which can be a problem for us.

18 The next I wanted to know, I did not really  
19 check because this is a two-day exam now, could our  
20 exam fees be lowered? Since it's a two-day exam,  
21 could the results be published earlier than we do now?

22 Okay. The next thing I wanted you tell you  
23 that debts created by the Bar exam. We have very high  
24 law-school tuition. Then we also take bar-prep  
25 courses, then we don't pass. Then we also have Bar

1     tutors, which charges, like, \$100 per hour. So  
2     students add up their debt, then they still don't  
3     pass. So that is a huge problem.

4             So the other thing I also noticed, lastly,  
5     is the -- what I like to say is education we get in  
6     the law school is very different from the tests we  
7     have to take in the Bar exam. In the law school my  
8     experience is that I did stellar briefing of cases,  
9     but in my Bar exam were not -- I'm not tested on  
10    briefing, I'm tested on writing. Now, I do have my  
11    own drawback a little bit because my major is computer  
12    science. And it was not English major or psych or  
13    something like that. So I really have to learn how to  
14    write in legal terms. So that's my own personal  
15    problem. Maybe that's why I haven't been able to  
16    pass.

17            But because I have passed the patent Bar,  
18    which is so different, and I'm now finding that it --  
19    it's difficult for me to pass the Bar exam. So I'm  
20    just saying to you, very quickly, that this subjective  
21    grading needs to be removed. And I don't know how you  
22    do it, because the same exam, like I said, I could  
23    write one essay and give it to you all and I'm going  
24    to get very different answers. So luckily, if I get  
25    somebody who has agreed with what I just wrote, maybe

1 I'll pass the Bar. That's all I have to say.

2 CHAIR GOODMAN: Thank you very much, Arti.

3 So our next speaker is Stephen Ferruolo.

4 MR. FERRUOLO: Thank you.

5 CHAIR GOODMAN: Thank you.

6 MR. FERRUOLO: Thank you for this  
7 opportunity to speak. I'm Stephen Ferruolo. I've  
8 been a member in good standing of the California Bar  
9 since 1992. My membership number is 159500.

10 I became a lawyer in my forties. I've  
11 practiced law for 20 years. I did deals for  
12 billion-dollar corporations, some of the leading  
13 technology and biotechnology companies in California.

14 I made a fortune. I'm a very wealthy man.  
15 The last thing I want to do is lessen the value of the  
16 license that enabled me to do so much for people, for  
17 myself, and for my family. And sometimes I think  
18 when -- particularly when people come up and argue for  
19 a lower cut score, there's some notion that somehow we  
20 don't value -- we don't understand the value of that  
21 license and what that means. I just want to dispel  
22 that.

23 Six years ago I basically retired from  
24 practice and I decided to become a law-school lead  
25 because of how much I value law and legal education.

1 Last night I welcomed our new students. I have never  
2 seen a group of more motivated young people who want  
3 to do great things with their law degrees, to change  
4 their society. I have never seen people more  
5 committed to justice, particularly in the wake of what  
6 happened this weekend in Charlottesville. So many of  
7 them spoke to me about what brought them to law  
8 school, the things they want to do with their law  
9 degrees.

10 And I was talking to them last night, and I  
11 was thinking about coming here today. I thought the  
12 fundamental question is: Why do we want to make it so  
13 much harder for them to become members in this state  
14 than in any other state in the tiny, irrelevant state  
15 of Delaware? Why do we want to do that? That was a  
16 question. Those aren't my remarks. I'm going to come  
17 to my remarks now.

18 First I want to thank the committee for its  
19 work. I want to especially thank Elizabeth Parker for  
20 her two years of service to the State Bar. Elizabeth,  
21 you've been a real trooper. Thank you so much for all  
22 the great work that you've done.

23 I know everybody's worked very hard, under a  
24 lot of time pressure, complicated issues to present  
25 and develop these studies. And I want to tell you,

1 those of you in law schools greatly appreciate those  
2 studies. You're going to be receiving comments,  
3 you're going to hear them from David Faigman about  
4 what we see are serious flaws in the standards study.  
5 You know, it seems to me that the independent experts,  
6 the ones that you have, the one that we've consulted,  
7 all see very serious flaws in the studies and in the  
8 data. That's not my expertise, that's not what I want  
9 to talk about.

10 To me it's whether or not these  
11 methodological flaws are fatal and how much they  
12 discredit the data in the report. To me there is  
13 sufficient evidence in the report itself, in the study  
14 itself, to call into question the recommendation made  
15 by the State Bar from a policy perspective. As the  
16 report itself concedes, where an attempt to cut scores  
17 is an issue of policy. It's policy. It's not an  
18 issue of mathematics and statistics and psychometrics.

19 And I just want to quote from the report  
20 itself. I've done this before, and I'm going to do it  
21 again because I think the language is so compelling.

22 Page 8 of the report, quote, Another related  
23 policy consideration is the cost-benefit analysis of  
24 either type of error as relates to the potential  
25 tension between public protection and access to legal

1 services. When the threshold for entry into practice  
2 is established at a level too stringent, access to  
3 justice may be negatively impacted. Closure related  
4 to access, pass rates for racial, ethnic, minority  
5 groups are sensitive to where a particular pass line  
6 is set. Too stringent a standard can restrict access  
7 and negatively impact diversity. Conversely, a lax  
8 standard is likely to increase the risk of harm to the  
9 public, close quote.

10 Weighing diversity of assets to justice  
11 versus harm to the public is certainly a difficult  
12 choice. However, the study itself gives us some  
13 pretty clear guidance and gives guidance, I believe,  
14 to Supreme Court policy makers to address this issue  
15 and to make that choice.

16 What about punitive harm to the public?  
17 Where is there any evidence of that? There is none.  
18 In fact, the report states the following -- the fact  
19 that California -- and I'm quoting again -- the fact  
20 that California has the second-highest cut score in  
21 the nation is an important factor for the Committee of  
22 Bar Examiners to consider.

23 There is no empirical, no empirical evidence  
24 that would support a statement that as a result of a  
25 high pass line California lawyers are more competent

1     than those in other states. Nor is there any data,  
2     any data that suggests that there are fewer  
3     attorney-discipline cases per attorney, per capita, in  
4     this state, close quote. No evidence, no data, none,  
5     nada whatsoever about harm to the public. But we hear  
6     about it all the time. If there's harm to the public,  
7     show the Court the data. Show the public the data.  
8     You have no evidence of it. There is no evidence of  
9     it.

10           On the other hand, the report itself  
11     provides clear and compelling empirical evidence of  
12     the impact of the high pass rate on diversity and  
13     access to justice. As shown on table 5 of the report,  
14     a reduction of cut score on the July 2016 exam, the  
15     1440 to the Bar-recommended cut score of 1414 does the  
16     following: It would result in increased passage rates  
17     of 12.5 percent for blacks, 10.6 percent for  
18     Hispanics, 8.6 for Asians, compared to 8.2 percent for  
19     whites. Those are compelling numbers.

20           Now I want to make a formal request to the  
21     committee to provide the following data. Show us,  
22     show the Court, show the public what the difference  
23     would be, what the increase would be in pass rates at  
24     the 139 cut score which is in the report, at 135,  
25     which is the cut score that the plurality of the



1 states have, and at 133. I'm making a formal request  
2 that that data be provided to the public and to the  
3 Supreme Court.

4 In our state where minorities are a  
5 majority, there is no compelling policy than that of  
6 ensuring the diversity of the legal profession to  
7 serve our diverse population of our state and to  
8 provide better access to justice throughout our state  
9 for all of our people. Show us the data. I think the  
10 data's going to be compelling for a cut score which is  
11 substantially below the 144 or the 141.

12 Thank you very much.

13 CHAIR GOODMAN: Thank you very much.

14 So our next speaker is James Schiavenza.

15 MR. SCHIAVENZA: Good morning. James  
16 Schiavenza.

17 THE REPORTER: Would you please spell your  
18 last name?

19 MR. SCHIAVENZA: S-c-h-i-a-v-e-n-z-a.

20 THE REPORTER: Thank you.

21 MR. SCHIAVENZA: I'm the acting dean at  
22 Lincoln Law School of Sacramento and I'm the chair of  
23 the Association of Law School Deans.

24 All the details that I planned on discussing  
25 with my remarks this morning have been covered quite

1 adequately by those who spoke before me. But I want  
2 to raise a couple of issues that perhaps summarize  
3 what has been said.

4 The theme of those issues is fairness and  
5 reasonableness. Fairness when our Bar takers are  
6 compared, at least by a scoring mechanism. I'm sure  
7 the State Bar, when compared with other jurisdictions.  
8 Fairness in terms of accessibility to legal services.  
9 Fairness in terms of access to justice. Fairness in  
10 terms of cost, and I'm talking about both costs in  
11 terms of tuition that students pay to attend law  
12 school, cost in terms of Bar review courses, cost in  
13 terms of retaking and again retaking the Bar exam.  
14 Fairness and reasonableness in terms of test accuracy,  
15 which reports seem to indicate that test accuracy will  
16 be achieved by scores much lower than the current 144  
17 cut score. Fairness that has been addressed earlier  
18 this morning about minority examinees and the  
19 disproportionate effect it has on the minority  
20 examinees. Fairness in terms of the study and data  
21 that has been provided that has been criticized quite  
22 heavily by those who spoke before me.

23 And we, as was previously stated, shouldn't  
24 be judged by Bar numbers, by a Bar score of 144.  
25 Competency should not be measured by perhaps two or

1 three multiple-choice questions that have not been  
2 answered accurately. And fairness and reasonableness  
3 require a severe change from the 144 and the 141 that  
4 have been previously recommended by the State Bar.  
5 And I hope you listen to the fairness concerns and  
6 reasonableness concerns that were expressed before me,  
7 and in terms of reaching a decision and recommending a  
8 decision to the Supreme Court on this issue.

9 Thanks very much.

10 CHAIR GOODMAN: Thank you very much, James.

11 So our next speaker is Dean Barbieri.

12 MR. BARBIERI: Good morning.

13 CHAIR GOODMAN: Good morning.

14 MR. BARBIERI: I'm Dean Barbieri, and I will  
15 spell that.

16 B-a-r-b-i-e-r-i.

17 THE REPORTER: Thank you.

18 MR. BARBIERI: Thank you for the opportunity  
19 to address the State Bar and the committee on this  
20 very, very important topic. And thank you also for  
21 fast-tracking this. One of my concerns in the past  
22 has been things have gone to the State Bar and there's  
23 a lot of tasks and things never get done. And we're  
24 very appreciative of the fact that the committee and  
25 the State Bar is moving as fast as it is on this

1 matter.

2 And Executive Director Elizabeth Parker,  
3 thank you very much for your service, not only as a  
4 law-school dean in California, but also for the last  
5 couple of years of service to our profession here in  
6 this state.

7 A little bit of background about myself. I  
8 have a little unique background involving the  
9 California Bar examination. I was admitted to  
10 practice law in 1980. In 1982, I was selected to  
11 serve as a grader on the California Bar examination.  
12 I graded every California Bar examination from 1982 to  
13 2000, as well as every first-year law student  
14 examination during that period of time. Combined,  
15 I've probably graded between 40- and 50,000 answers of  
16 essays and performance tests on the California Bar  
17 examination. I've also served in different capacities  
18 with the National Conference of Bar Examiners,  
19 including serving on the education program and uniform  
20 Bar-exam committees for the National Conference of Bar  
21 Examiners.

22 Presently I'm the dean of the law school at  
23 John F. Kennedy University. And after I served in  
24 private practice in 2000, I was asked to serve as the  
25 director for examinations for the State Bar of

1 California, and I served in that capacity from 2001 to  
2 2010. As a director for examinations, my  
3 responsibilities included the development of the essay  
4 and performance test portion of the Bar examination,  
5 as well as involvement with the grading and  
6 administration of the examination. And I also served  
7 for a couple of years as the interim director of  
8 moral-character terminations.

9 So I know a little bit about the Bar  
10 examination, I know a little bit about the admissions  
11 process. Executive Elizabeth Parker, if you ever get  
12 asked again: How do they come to the 1440? I've got  
13 the answer for you.

14 There was never a standard-setting study  
15 done in the '80s. The '80s -- when people talk about  
16 how did we get to 144 or 1440 out of 2000, that was  
17 done in the mid '80s and it was a mere conversion from  
18 one scale in the past to the 2000 point scale. So in  
19 the '80s a standard-setting study was not performed.  
20 It was a mere statistical conversion from one scale to  
21 another.

22 So where did the 144 or 1440 come from? It  
23 goes back to the '50s and '60s and it's what the  
24 hypothetical passing score of a 70 was. And I've  
25 talked to graders in the '50s and '60s, the former

1 director for examinations who served in the mid '80s  
2 when the new 1440 was adopted, and all those things  
3 have been confirmed.

4 So I'm here. You know, I was asked -- I  
5 volunteered to serve on the standard-setting study. I  
6 was the recommendation of the Cal Bar schools to serve  
7 in as the representative of the Cal Bar schools on  
8 that study. Unfortunately, I wasn't selected. I was  
9 selected instead to serve on the content and validity  
10 study, which I was very happy to do even though I  
11 hadn't volunteered to do that.

12 So what is my recommendation? I don't  
13 understand the 1414. I think it's a statistical  
14 number. It's one standard deviation which bears no  
15 relationship to minimum competence. Instead I think  
16 there's a number that already exists that is being  
17 used by the committee and is approved by the Supreme  
18 Court of California, and that number's 1390 or putting  
19 everything -- do you wonder why you have 1390 and 139?  
20 Because California just reports one digit to the left  
21 of the decimal point than every other state.

22 So why 139? It already exists. And it  
23 exists because it's close enough to the standard of  
24 1440 that the committee has felt that those people are  
25 close to the passing line, but given the aspects of

1     grading can be somewhat inconsistent, that those  
2     people who fall between 1390 and 1439 deserve a second  
3     read.

4             And so it's close to but not at the passing  
5     standard. And as a grader, frankly, the difference  
6     between 1440 and 1390 is when you have a three-day  
7     exam, 50 scale points, which is the equivalent of 25  
8     raw points, which if you took a performance test and  
9     someone got 10 points on a performance test  
10    differential, those ten points are multiplied by two,  
11    which is 20 raw points, and then each raw point is  
12    worth two scale points.

13            And so the difference between 1390 and 1440  
14    is 25 raw points on a three-day examination or 17  
15    multiple-choice questions. It's really close. And  
16    for a grader or someone else to say that there's a big  
17    difference between 1390 and 1440 and we can tell that  
18    the person who achieves less than 1440 does not  
19    possess the minimum competence to be a first-year  
20    lawyer in California, I strongly disagree.

21            And another thing I think you should look at  
22    is Dr. Roger Bolus has -- Dr. Roger Bolus, the  
23    committee psychometrician, has these numbers. If you  
24    look at persistent takers -- and a "persistent taker"  
25    is someone who is not successful but who takes a

1 subsequent examination -- you'll find that those  
2 people who achieve a 1390 ultimately -- and they're  
3 persistent takers -- will achieve the 1440. Now,  
4 you'll ask yourself, Are they more competent? Or do  
5 they just learn from their mistakes? So I think it's  
6 important to look at those numbers and ask Dr. Bolus,  
7 you know, what percentage of people who are persistent  
8 takers who achieve a 1390 at one point ultimately  
9 pass? And are we turning less competent people in to  
10 the public? I don't believe so. As the dean of a law  
11 school, I work with all of our students who are not  
12 successful on the examination. And I see errors.  
13 It's not that they don't know the law; it's they're  
14 making errors based on the presentation.

15 Earlier someone mentioned about the selected  
16 answers that appear on the State Bar website. I used  
17 to be responsible for selecting those selected  
18 answers. They do a terrible, terrible disservice for  
19 people studying for the Bar examination. They're  
20 represented as good questions for people who have  
21 passed.

22 They're not good questions. They're all 90s  
23 to 100s. They are extraordinary questions. They may  
24 be on the performance tests of people who were  
25 research attorneys before the United States Supreme



1 Court who come to California. They're not good  
2 questions from people who passed. They are the top 1  
3 percent of 1 percent of people who have been  
4 successful on the Bar examination. And bar-review  
5 companies and law schools and law students who are  
6 studying for the exam look at those and think, This is  
7 what I have to do to be successful? And they try and  
8 pattern their answers as a result. In reality they  
9 oftentimes have irrelevancies. You don't know if  
10 someone spent an hour and a half on an essay question  
11 that's turned in.

12 So this is off topic a little bit, but I  
13 think to help the Bar-passing rate, one of the things  
14 that the Bar should consider doing is what the  
15 national conference does, and that's make grading  
16 guidelines available to the students to show what is  
17 necessary for success on the examination and also  
18 publish some answers that are 70, 75, 80 as to opposed  
19 to the 90 to 100 answers, because you're sending a  
20 terrible message to prospective Bar takers if you  
21 think that those selected answers -- people try to  
22 mimic those, and there's no way in the world that they  
23 can.

24 Okay. If you went to 139, I'm very  
25 confident that you would not find a whole batch of

1 less-competent people entering the profession.  
2 California would still be at the top of all the big  
3 states and there would only be a handful of states  
4 that have a score between 140 and 144. The 1414, as I  
5 mentioned, doesn't -- in the report it doesn't have  
6 any bearing or relationship to minimum competence.  
7 It's just the statistical computation that's one  
8 standard deviation below 144.

9 And lastly, New York, as it was considering  
10 changing its standard, and I believe this was in the  
11 early 2000s, they were at 132. They did a  
12 standard-setting analysis done by Roger of Klein --  
13 excuse me, Roger Bolus and partner Steve Klein. The  
14 recommendation to the New York highest court was 135.  
15 The law schools went crazy saying, This is going to be  
16 terrible. So the compromise was at 133. So a great  
17 state like New York does a standard-setting analysis,  
18 they come up with 133.

19 And I think that California at 139 is  
20 significantly higher than that. Last comment, we have  
21 people, lawyers in California that we welcome.  
22 They're dues-paying lawyers. Out-of-state lawyers who  
23 are registered in house, pro bono, and they have  
24 passed the Bar examinations in other states, many of  
25 whom are from New York, whose standard is 133.

1           We welcome them to California. We ask them  
2   to pay dues in California. They have all the rights  
3   and privileges, you know, they're registered in-house,  
4   as long as they're representing their corporation.  
5   But we're not asking them to prove that they got a 144  
6   or a 139. We're going as low as Alabama used to be,  
7   128, and now it's -- Wisconsin is the lowest at 129.  
8   But we welcome them.

9           So thank you very much for the opportunity  
10  to address the committee and the State Bar. And if  
11  anyone ever has any questions about history or  
12  anything else, I'm always happy to provide  
13  information. Thank you.

14           CHAIR GOODMAN: Thank you very much.

15           So our next speaker is Linda Martin.

16           MS. MARTIN: Good morning.

17           CHAIR GOODMAN: Good morning.

18           MS. MARTIN: My name is Linda Martin. I'm  
19  not affiliated with --

20           THE REPORTER: I'm sorry. I'm not hearing  
21  you.

22           MS. MARTIN: Oh. My name is Linda Martin.  
23  I'm not affiliated with any particular group; I'm here  
24  to just make a personal public comment.

25           CHAIR GOODMAN: Okay.

1 MS. MARTIN: I wanted to just bring up a  
2 couple of issues. First is whether lowering the  
3 standard will create more ethical lawyers, more  
4 hard-working lawyers, or just more lawyers.

5 And what's really our goal? I think the  
6 exam should be reviewed for practical application to  
7 real-life practice. Two, who would be grading these  
8 exams? And three, who's preparing students for the  
9 exams?

10 Practical application, I would look at  
11 performance portion as being the most applicable to  
12 real life. The MBA really doesn't apply to real-life  
13 practice and neither does the essay. In fact, I think  
14 the essay's quite subjective.

15 The second area I mentioned was grading.  
16 Right now grading is limited to individuals who have  
17 passed the Bar the first or the second time more than  
18 likely because individuals have taken Barbary.  
19 Barbary has a monopoly over the bar-exam industry, so  
20 you're really limited to a very specific type of  
21 thinking as far as how to pass the Bar exam.

22 And there's a variety of Bar graders. I  
23 mean, there should be a variety of Bar graders.

24 The third area I mentioned was preparation.  
25 Barbary has quite a monopoly, and I mentioned them a

1 moment ago. There are quite a few other Bar-prep  
2 courses that really take advantage of struggling  
3 students in schools that are not necessarily ABA  
4 approved. And all those Bar-prep courses are as  
5 expensive or more expensive than Barbary.

6 A suggestion that I would make would be to  
7 add a fee to the Bar, and if Barbary is going to have  
8 a monopoly, have Barbary come in as a contractor and  
9 have Barbary actually provide the Bar-prep courses for  
10 all students so that all students are getting the same  
11 training, you know, when they're taking the Bar. That  
12 would equalize the actual testing and make sure that  
13 all, you know, prior to taking the exam you pay a fee  
14 anyway. So if that fee is increased and it ensures  
15 that there is some type of prep course, that would  
16 make it equitable for everybody who is taking the Bar.

17 As far as lowering the score, it seems to be  
18 a Band-aid when you look at issues, it's whether law  
19 schools are they teaching the exam or are they  
20 teaching to actually practice? There are other  
21 solutions that exist that would create more equity  
22 among those who are taking the Bar exam rather than  
23 lowering the scores.

24 Personally, I'm all too familiar with the  
25 Bar exam. I'm a multiple Bar-exam taker. I'm a

1 first-generation Mexican-American. I didn't take  
2 Barbary the first time. I took many Bar-prep courses,  
3 so I'm an expert on Bar prep and what is working and  
4 what's not. I also went to a non-ABA school. I went  
5 to non-ABA night school by choice because I wanted to  
6 have an experience where I walked out of school with  
7 no debt. And I also wanted to ensure that I had  
8 experience in areas.

9 So I went to a four-year school. One year  
10 during the day I worked at a law firm. One year I  
11 worked at a nonprofit. One year I worked at a  
12 corporation. And the last year I worked in  
13 government. I'm currently working in government.

14 And so that was the experience that I chose  
15 and that I wanted. So last time I took the Bar exam,  
16 and this is kind of important, because I mentioned  
17 before that. I had taken all these Bar-prep courses,  
18 spent a significant amount of money on the courses. I  
19 had no Bar prep. I had not taken any months off work,  
20 any time off work except three days necessary to take  
21 the Bar exam.

22 I had a one-and-a-half-year-old at home. I  
23 had a full-time job. I studied between 3:00 a.m. and  
24 7:00 a.m. every morning. I would wake up when I had  
25 to feed the baby. And then I would go to work after I

1 fed the baby. And that was the time I passed. My  
2 chances of passing were less than 6 percent. I was no  
3 smarter the last time I took the Bar exam. Excuse me.

4 I still consider it an honor to be an  
5 attorney. So just in case you may think I have  
6 nothing to tie my experience to, my brother went to a  
7 top-tier law school while I was in law school and my  
8 younger sister was going to a third-tier law school.  
9 So at the dinner table we often talked about Bar prep  
10 and what it was to take the Bar and prep for the Bar.

11 So, in conclusion, I'm not advocating or not  
12 advocating to lower the Bar exam pass rate. What I am  
13 saying is that I do think that this is a bad move. I  
14 think that there are larger issues of equity that  
15 really truly need to be discussed. I don't know that  
16 lowering the pass rate is going to provide more  
17 attorneys. I don't know that it's going to do  
18 anything more than provide more attorneys. I think  
19 that we really need to look at who's grading the  
20 exams, what classes people are taking, what schools  
21 are being licensed. And if they're not being  
22 licensed, then why? And if it's because the Bar pass  
23 rate is low, then maybe we need to take another look  
24 at it.

25 But I think, as I've stated before, there's

1 really little correlation between the exam and  
2 practice. I do know that equity exists. I know that  
3 there are subjective issues that really are discussed  
4 because at some point you have to have something  
5 subjective and someone to grade these exams. But I  
6 don't know that everybody who grades the exams needs  
7 to be a first-time taker or a second-time taker. I  
8 think that that should be expanded to somebody who has  
9 taken the exam multiple times. And I think it would  
10 be great to see some studies on who's actually grading  
11 the exams, what bar-prep courses they took, and what  
12 the results will be.

13 I would ask that the Bar grader to be in  
14 particular areas. And I consider it an honor to be an  
15 attorney today and I love practice. So I really hope  
16 that more people do practice the Bar. I just don't  
17 know if this is the way to go about it.

18 CHAIR GOODMAN: Thank you, Linda.

19 So our next speaker will be Dan Hagman  
20 (sic).

21 MR. FAIGMAN: Just a correction to the  
22 record, it's David Faigman.

23 CHAIR GOODMAN: Okay. I wrote it down  
24 wrong. Sorry about that.

25 MR. FAIGMAN: That's okay.



1 THE REPORTER: Would you please spell your  
2 last name for me?

3 MR. FAIGMAN: F, as in Frank, a-i-g-m-a-n.

4 THE REPORTER: Thank you.

5 MR. FAIGMAN: I'm the chancellor and dean at  
6 U.C. Hastings here in San Francisco. I'd like to  
7 thank the committee, the State Bar, Elizabeth Parker  
8 for her service. Unfortunately she has left the room.  
9 I will pass that on to her.

10 CHAIR GOODMAN: We will as well.

11 MR. FAIGMAN: Thank you for many  
12 opportunities to respond to the efforts, to respond to  
13 the California Supreme Court's mandate that the State  
14 Bar study the Bar exam. My bottom line is that I  
15 stand by the original position of the dean's letters  
16 and the ABA-accredited schools that 20 out of 21 deans  
17 signed to the California Supreme Court that the cut  
18 score of 133 to 136 shouldn't be adopted until  
19 adequate research is done.

20 Basically, in order to do adequate research  
21 on the question that ought to be answered here would  
22 take considerable time, certainly more than a couple  
23 of months that was employed to do the standard-setting  
24 study that is involved here. Somebody who is trained  
25 in social science methods, somebody who teaches

1 statistics and research methods to law students and to  
2 judges, it is my opinion that such research would take  
3 at least one to three years to do adequately.

4 It cannot be done in a single study; in  
5 fact, one of the first things that you learn in  
6 graduate school is that no policy ought to be pursued  
7 on the basis of a single study. And that any legal  
8 contact whatsoever that's relying on a single study is  
9 likely to find itself in error over time.

10 In addition, the operative question here is  
11 not what was studied. The operative question should  
12 be: What is the validity of the Bar exam for the  
13 purpose of distinguishing a qualified attorney from a  
14 not-qualified attorney? And that is in terms of their  
15 practicability. So the bottom line is, the question  
16 was an attorney that scored 133, the New York cut  
17 score, would be distinguishable from someone who  
18 scored 144, the California cut score, on traits that  
19 we would all agree are necessary to the practice of  
20 law, such things as analytical ability, doctrinal  
21 knowledge, reliability as an attorney, ethical  
22 standards, interpersonal social abilities, judgment,  
23 and so forth. And there's nothing that suggests that  
24 the Bar exam related to those qualities that you would  
25 want to assess if you were assessing somebody who was

1 ready for the practice of law.

2 So relating Bar performance to practice  
3 performance, relating Bar performance to practice  
4 performance is possible to do. The standard-setting  
5 studies does not do that, but it is certainly possible  
6 to have social scientists to study the construct  
7 validity of the Bar, that is to relate whether the Bar  
8 exam actually predicts whether somebody is or is not a  
9 qualified attorney.

10 The first thing that should be done -- and  
11 again, that would take some time to do. The second  
12 study, which I have suggested to the Bar previously,  
13 as well as to psychometrician Chad Burkendahl and  
14 Roger Bolus, your statistician, that it is well  
15 understood in social science and medical causation  
16 that you have continuous data, and that is basically  
17 what you have in the case of Bar results. But you're  
18 setting a categorical decision like pass/fail. It is  
19 best practices in the industry to establish a  
20 sensitivity specificity cutoff, what scientists and  
21 statisticians refer to as a lock curve. You see our  
22 operating characteristic. I sent you an article on  
23 that, and it was not pursued.

24 But that analysis which is well understood  
25 by scientists and statisticians generally would allow

1     you to actually balance the false-positive  
2     possibilities versus the false-negative possibilities.  
3     So clearly there is a possibility of making a mistake  
4     when you're making a categorical decision of  
5     pass/fail, where if you would be required to practice  
6     law but you failed, that is a false positive. So  
7     there are lots of consequences for that, many of which  
8     we've heard from today, regarding lost opportunities,  
9     greater debt, disproportionate on ethnic and racial  
10    minorities, and so on and so forth.

11           Similarly, there are consequences that occur  
12    if you make the other kind of error, false negative  
13    error. That is you have somebody that should have  
14    failed. But you have to now practice disciplinary  
15    concern. And statisticians for many, many years have  
16    studied this very question of where you draw a line  
17    for the categorical decision in light of continuous  
18    data and asking the issue -- or asking the question  
19    whether one error is of greater gravity than the other  
20    error. And that's something that has been completely  
21    ignored in this research, and if you had more time you  
22    would do it.

23           But the bottom line is that the same part of  
24    the approach reflects a fundamental understanding of  
25    how research needs to be done to validate the cut

1 score that would be used in the state; that a  
2 standard-setting study of the type that was done here  
3 by a psychometrician may indeed be the state of the  
4 art in psychometrics, but it's not the state of the  
5 art in social science. And it's certainly not the  
6 state of the art in terms of doing a contravalidity  
7 analysis. A true validity study, in fact, many true  
8 validity studies really are needed in this context.

9 Also, it is certainly possible to do a  
10 study -- it is so impossible to do this kind of study  
11 that would be necessary to compare a performance on  
12 the Bar exam to evaluations of attorney practice  
13 abilities. It is not possible, however, to do the  
14 kind of study, even this psychometric study, within  
15 the period of time that you had available.

16 I do not in any way question the integrity  
17 of the committee or the State Bar. I think you simply  
18 set yourself up; and perhaps the California Supreme  
19 Court set you up for an impossible task. It was  
20 simply not possible to do this kind of study this  
21 complex in the two months that you tried to do it.  
22 And so the errors that we will provide to the  
23 committee and the California Supreme Court in greater  
24 detail in writing were more or less inevitable. This  
25 simply was not done very well.

1           And again, I don't blame the researcher, I  
2           don't blame the committee. I think any group could  
3           not have done it within the two months. And so I  
4           think the California Supreme Court should adopt an  
5           interim solution, which is what we advocated for back  
6           in February. That it adheres to national standards  
7           until adequate research can be done.

8           In conclusion, California should use either  
9           a comparable state score, such as New York, 133, or  
10          the median of all states in the country, which is 135.  
11          Neither may be the perfect cut score for California.  
12          We do need to study the matter. But in the meantime,  
13          California should not continue to be such an extreme  
14          outlier. Doing something because everyone else is  
15          doing it may not be the best basis for acting. But  
16          when the lives and careers of so many young people are  
17          at stake, it's a whole lot better than departing from  
18          what everyone else does for no reason whatsoever.

19                 Thank you very much for your time.

20           CHAIR GOODMAN: Thank you very much, David.

21           So our next speaker is Anthony Nedwick from  
22          Golden Gate. And I know I mispronounced the last  
23          name.

24           MR. NIEDWIECKI: You were close.

25           I'll spell that for you. Don't worry. It's

1 N-i-e-d-w-i-e-c-k-i.

2 THE REPORTER: Thank you.

3 MR. NIEDWIECKI: I'm the new dean at Golden  
4 Gate University School of Law.

5 CHAIR GOODMAN: Congratulations.

6 MR. NIEDWIECKI: I'm celebrating my two-week  
7 anniversary today. But before that, I was with John  
8 Marshall Law School in Chicago, and I worked closely  
9 for the last five years or so with the Illinois Bar on  
10 similar issues, but kind of in reverse when we were  
11 looking to raise the score there.

12 I planned to join the other lawyers in their  
13 statements that have been brought here today. Today  
14 I'd like to talk a little bit about something  
15 different and address some state studies that I hope  
16 will add to our discussion about the cut score. I  
17 first want to start by talking a little bit about why  
18 I came to Golden Gate to be their dean, because that  
19 really will drive my comments today.

20 First I was drawn to the law school's  
21 commitment to diversifying the profession. In fact,  
22 this week we started at school and I'm proud to say  
23 that 63 percent of our entering class identifies as a  
24 member of a diverse group. 64 percent are women, 44  
25 percent are first-generation college students, and 11

1 percent identify as LGBTQ. All of these groups are  
2 underrepresented in our profession here in our state.

3 The second reason, it's the law school's  
4 focus on preparing students for the practice of law,  
5 by having them work very closely with clients while  
6 they're in law school. We have some community  
7 programs at Golden Gate where many of our students  
8 spend one and maybe even two full semesters working  
9 full time, either in our legal clinics or under the  
10 close supervision of practicing attorneys in an  
11 externship.

12 Now, with that in mind, I'd like to talk  
13 about two studies from the other state that touch upon  
14 the reasons that I became dean at Golden Gate. The  
15 first study was done to study the impact on an  
16 increased score in the state of New York, whether that  
17 increased score had an impact on minority students.  
18 This is about a ten-year-old study, but I think it  
19 remains relevant today. The state first did a small  
20 increase and then wanted to study that impact and also  
21 to see what the impact would be on future changes.

22 The report found that even raising the score  
23 a few points had a negative impact on minorities, and  
24 I quote the report, Among the first-time takers, the  
25 black African-American group and other minority groups



1 suffered sharper declines in pass rate than the  
2 Caucasian white group as the passing score goes up.  
3 The state decided not to raise the score further  
4 because of this report. I'm going to provide you  
5 copies of the reports today (indicating).

6 In Illinois, when we were discussing the  
7 proposed increases there, we discussed this report and  
8 it was dispositive on the Illinois Supreme Court in  
9 determining that they only went up what would be  
10 comparable to one point here instead of four points  
11 that they were proposing.

12 I think there's little doubt that the impact  
13 study on the California Bar would produce similar  
14 results between a cut score 1350, which is the most  
15 common cut score in the country, to 1440, which is our  
16 current cut score. And I second the request earlier  
17 to find out from our statisticians what the impacts  
18 would be at those different rates of 1390, 1350, and  
19 1330.

20 The second study relates to an alternative  
21 Bar-admissions program that's in the state of New  
22 Hampshire. The University of New Hampshire over ten  
23 years ago started a Daniel Webster Scholars program.  
24 The program essentially selects 24 students each year.  
25 At the end of the first year, to be part of this

1 program, students take a series of basic courses that  
2 many other students do. Those are the types of  
3 courses that are on the Bar exam here. The students  
4 also take a number of more skills-based and  
5 practice-oriented classes, like alternative dispute  
6 resolution, trial advocacy, problem-solving, business  
7 transactions, pretrial advocacy, et cetera.

8 The students are also required to take six  
9 credits in a clinic or a closely supervised  
10 externship. The students have to successfully  
11 complete and examine each one of those courses. The  
12 students also submit a portfolio that compiles their  
13 work over the two -- course of the two years in the  
14 program. The portfolio itself was evaluated by a Bar  
15 examiner in the state. The student also meets with  
16 the Bar examiner and is questioned by that Bar  
17 examiner. Upon graduation and a clearance under  
18 character and fitness, the student becomes a member of  
19 the State Bar.

20 The study that was done in 2015 on this  
21 program compared the graduates in that program with  
22 those who only took the Bar exam in the state of New  
23 Hampshire. The study used what they call the  
24 standardized client assessment to evaluate the work in  
25 each group. And unsurprisingly to me, and many of the

1 deans in the room, the students in the program  
2 outperformed significantly lawyers who simply took the  
3 Bar exam. Further, the only predictor of the  
4 standardized interview performance was participation  
5 in the program. There was no correlation between LSAT  
6 nor class rank proved to be predictive.

7           Additionally, focus groups that were done  
8 for the study, comprised of lawyers across the state  
9 showed that most of those people felt that the people  
10 that were in the program were clearly a step ahead of  
11 the other law graduates. But I think the lessons we  
12 can take -- and again, I have a copy of that for you  
13 as well -- is that students who take a program with  
14 numerous skills-based courses and have significant  
15 opportunities to work with clients will be better  
16 prepared than those who simply pass a Bar exam with  
17 the traditional curriculum in law schools.

18           Law schools, as you know, have a set number  
19 of credits to teach students. Many of those credits  
20 are driven by the ABA. With the California score so  
21 out of synch with other states, California schools are  
22 required essentially to spend more time teaching  
23 students how to take an exam, take the Bar exam,  
24 instead of providing them the essential skills and  
25 opportunities to engage with clients in real practice.

1           An ABA study done in 2010 showed that  
2       there's been a big increase of schools that are now  
3       requiring or offering courses that are strictly on how  
4       to pass the Bar exam. Those courses then take the  
5       place of the types of experience I talked about  
6       earlier. This study, though, shows that graduates are  
7       better prepared when time in law school is spent  
8       practicing the skills necessary rather than taking  
9       courses on how to pass the Bar exam.

10           I know many lawyers out there and clients  
11       and employers will want to hire somebody who had hours  
12       spent working on real client matters instead of those  
13       who just simply passed a Bar exam with a very cut  
14       score, especially when there's absolutely no evidence  
15       out there that the lawyers in the other 48 states that  
16       have cut scores below California are less prepared.

17           I want to continue to offer these particular  
18       kinds of experience to my students at Golden Gate  
19       University. The continuation of such a high cut score  
20       will drive us to have to make different decisions that  
21       I think are not in the best interests of consumers and  
22       the clients out there as well as our students. So  
23       I'll share these studies with you.

24           Thank you very much.

25           CHAIR GOODMAN: Thank you very much, Andrew

1 (sic).

2 MR. WINNICK: Anthony.

3 CHAIR GOODMAN: Anthony.

4 Our next speaker is Mitch Winnick.

5 Do you need a break?

6 THE REPORTER: Yes, please.

7 CHAIR GOODMAN: Okay. We'll take a break,  
8 That's my list. And if there's anybody else that  
9 needs to speak -- we'll take, like, a five-minute  
10 break.

11 (Break taken.)

12 CHAIR GOODMAN: We can go back on the  
13 record. Everybody's had their break.

14 THE REPORTER: Thank you.

15 CHAIR GOODMAN: We have at least one more  
16 speaker, and I think the comments have been great so  
17 far, very informative.

18 Samuel Chang?

19 MR. CHANG: Good morning.

20 CHAIR GOODMAN: Good morning.

21 MR. CHANG: Thank you for the opportunity  
22 for me to speak today. My name is Samuel Chang.  
23 Some of you might recognize me as I testified in front  
24 of the California Assembly Judiciary Committee earlier  
25 this year on this topic. I wanted to thank the

1 committee for working diligently and with great  
2 urgency to ensure that a lower cut score will be  
3 applied to the recent administration.

4 To explain about myself, I'm a rising  
5 third-year law student, the student-body president for  
6 U.C. Hastings for the past year and this coming year.  
7 And it's in the direction of the Korean-American Bar  
8 Association of Northern California.

9 I've been newly elected as the student-body  
10 president and the ABA representative of all 24  
11 ABA-accredited law schools to be a director of legal  
12 education for the American Bar Association and Law  
13 Students Association and now will sit on the -- in the  
14 section of legal education and admission to the Bar.

15 This past week in the ABA annual meeting, at  
16 least 11 student-body presidents from California  
17 schools and I have met and discussed this issue. And  
18 we will be forming a caucus and we will be writing a  
19 letter to you shortly for public comment.

20 However, today, I do not speak for or on  
21 behalf of the ABA or the law-school division. Here  
22 I'm testifying in my capacity as a California law  
23 student. There's a lot to say, but I'll keep it to a  
24 few points.

25 I urge you to consider a much lower Bar

1 passage cut score than the proposed cut score of 1440.  
2 We should aim for a cut score that will be in line  
3 with a comparable state, that would be the state of  
4 New York. That would mean the cut score to be lower  
5 than at least 140, where Virginia is 133 or where New  
6 York is.

7 California has done better on the MBEs in  
8 their -- department, but still has a lower pass  
9 average. Does that mean that they, with a lower cut  
10 score like New York, is more likely to pass than  
11 those -- are more likely to pass those who are less  
12 fit to be lawyers because of a low cut score? In  
13 other words, does the 1,789 test takers who couldn't  
14 pass the California Bar in July 2016, if in your  
15 Bar-passage structure was applied would not be fit to  
16 practice in California but would be perfectly fit to  
17 practice in the state of New York?

18 There is a study that would suggest that a  
19 lower Bar-passage score was significantly reduced for  
20 protection of a consumer. Despite some saying that  
21 the California or high Bar-passage cut score protects  
22 the public from unqualified lawyers. There is little  
23 to no evidence that a state with a higher Bar-passage  
24 cut score has led to a decreased rate of malpractice.

25 A study from Pepperdine noticed a link lower

1 Bar, and increased rate of malpractice is misleading.  
2 In particular, the study extrapolated Bar-exam success  
3 based on LSAT score and did not have any access to Bar  
4 score. The knowledge is limited to those who pass the  
5 Bar under current high pressure since one can't get  
6 disciplined unless he passed the Bar.

7 In the end, all of those who passed the Bar  
8 add to the Bar concentrate, not take away from it.  
9 Even if their results are based on valid data,  
10 Professor Velmes (phonetic) points out our discipline  
11 is not directed at incompetence. A lower Bar as a cut  
12 score does not therefore seem to affect the protection  
13 of consumers as some have claimed.

14 In fact, one could look at Wisconsin, which  
15 doesn't have a Bar exam required for the graduates of  
16 its law schools. Has Wisconsin suffered significantly  
17 in protecting the consumer? I don't know about you,  
18 but I have not heard about the explosive incompetence  
19 in Wisconsin, which doesn't have the Bar required for  
20 its graduates.

21 But here's what's explosive: The higher Bar  
22 cut score reduces access to diversity. I see the cut  
23 score an arbitrary barrier to access to minority law  
24 students and communities of color, especially when  
25 it's a definition of a minimally competent



1 practitioner was not properly defined when the 1440  
2 cut score was decided.

3 While I agree a minimally competent  
4 practitioners should have appropriate knowledge of the  
5 doctrine and skills to apply such doctrine, I disagree  
6 that this cut score of 1440 is the floor and that this  
7 should be a main gatekeeper when the skills of a  
8 lawyer involve skills like empathy and creativity.

9 The Council for Racial and Ethnic Diversity  
10 in the educational pipeline point out that just in its  
11 July 2015 administration of the California Bar, 71.8  
12 percent of whites passed, while only 53.4 percent  
13 blacks, 61.3 percent Hispanic, and 65.9 percent of  
14 Asians passed.

15 Furthermore, it's law schools with more of a  
16 diversity that seem to have more students not pass the  
17 Bar. These high cut scores does not service for these  
18 students. Instead, the high Bar cut scores leads to  
19 minority students to keep paying more to retake the  
20 Bar exam over and over again, when lower cut scores  
21 accept -- can practice and provide services to the  
22 community.

23 Since the implementation of the 1444  
24 research including those by Dr. Klein and  
25 Dr. Buckendahl from 1985 have continuously pointed out

1 that lowering the cut score would have a great  
2 increase for minority groups. In keeping the cut  
3 score high, we are not protecting consumers, but this  
4 is incentivizing the consumer by barring lawyers who  
5 shall reflect the growing adequacy in California. The  
6 Bar, like many tests, is a financial exercise. Those  
7 who have the money can buy the thousands required for  
8 Bar tests. Those who have money can afford to live  
9 and focus on only studying. But many from minority  
10 groups are fully on loans and are limited in their  
11 finances. Some of them have to work to just live  
12 during the few months before the Bar. Some can't  
13 afford the Bar material. This is a question of how  
14 much financial freedom one has.

15           Unfortunately, most minority students do not  
16 have that. They do not have the funds to afford \$800  
17 for examination fees and another \$3,000 for Bar exam,  
18 not to mention the interest that is beginning to  
19 accrue on their law school debts and that they have to  
20 pay rent and food. But by lowering the Bar, more  
21 minorities can be accepted into the legal community.

22           In a country that has prided itself in being  
23 a melting pot, and a country that is in great need of  
24 seeing all sides, a diverse legal community which  
25 contributes to a better understanding and access for

1 all, certainly there is more to do in diversifying the  
2 legal profession than lowering the Bar, especially in  
3 California. But it's one step, nonetheless. It is  
4 clear that there is no real understanding of how 1444  
5 measures better competence than lower competence.  
6 What changes in competence can be measured in a  
7 different cut score? I strongly ask that this  
8 community seeks to define how competence is measured  
9 by the Bar.

10 That said, I strongly disagree with the  
11 study that proposed the cut score of 1440 and 1414.  
12 1414 was a score that was decided as just one standard  
13 deviation below the standard in the study. Let's  
14 consider this: When even the panelists who assisted  
15 in studying this recommended cut score expressed some  
16 confusion of how the cut score was even implemented,  
17 the validity suffers, in my view. Additionally, the  
18 panelists were not competent to be the ones used to  
19 cut the score.

20 A panelist noted that there were concerns  
21 that unprepared attorneys without the benefit of the  
22 experience, studying or rubric is not a good indicator  
23 of a minimally competent attorney. While their  
24 panelists on that say that many of us clearly do not  
25 know some applicable law and these conclusions may

1       therefore determine that incompetent answers amounting  
2       to malpractice are nonetheless patently incompetent.

3               Lastly, I believe panelists were  
4       inappropriately influenced by one panelist who was the  
5       former chair of the examination department grading  
6       team for the California Bar Exam. We should adopt  
7       better practices. As we move to being more like other  
8       states by moving to a two-day Bar, the committee  
9       should also continue adopting similar cut scores to  
10      those states. The proposed lower cut scores should  
11      make California still the third highest Bar score in  
12      this country. The most here is 1350.

13              Last week legal education also takes a hit  
14      from the low Bar passage rate. Students become more  
15      worried about passing the Bar than getting a job.  
16      Instead of taking clinics or legal work, they stay at  
17      school and take more Bar courses. One student phrased  
18      it well, that the great irony is that to be a lawyer  
19      at all I have to be more unprepared for the actual  
20      job.

21              Legal education was not made to simply teach  
22      to the Bar, but teach practical skills and experiences  
23      to be a lawyer. But the Bar exam makes legal  
24      education all about being better test takers than  
25      being better lawyers. The Bar fails to test the

1 competence of law students. It is counterintuitive to  
2 teach to pass the Bar when you cannot develop the  
3 skills to be a lawyer.

4 Students have made clear that despite the  
5 diminishing Bar passage rate, law schools must not  
6 throw the baby out with the bath water. And should  
7 continue to train lawyers, not judge, to the Bar.

8 In conclusion, I've heard that the Bar is a  
9 Bar of competence. But if it is of competence, I hope  
10 you ponder this point. I said this to the judiciary  
11 committee before: If U.S. advocate Kamala Harris,  
12 former dean of Stanford Law School, Kathleen Sullivan,  
13 and two California governors, Jerry Brown and Pete  
14 Wilson, could not pass on their first try but were  
15 widely successful as California's attorney general, a  
16 top law-school dean, and governors of California.  
17 What does that say of the Bar?

18 Students are prevented from becoming  
19 lawyers. Consumers are prevented access to lawyers to  
20 understand and learn from their culture, and  
21 California loses out on great lawyers. There are many  
22 good lawyers in California. There can also be just as  
23 many good lawyers. And that starts with changing the  
24 arbitrate hands of the Bar examination.

25 I leave you with this last quote, Dean David

1 Faigman, who spoke earlier, wrote a letter about  
2 suicide of a student after they found out they failed  
3 the Bar. He wrote that, This is not the only story we  
4 need to tell, nor to hear. We need to hear that how  
5 we score on an exam is not the measure of our  
6 potential as a lawyer, much less our worth as a  
7 person.

8 So I ask the committee to seek a cut score  
9 of 1350 and continue to be a floor rather than an  
10 arbitrary high bar that is disastrous to consumers and  
11 law students alike. Thank you.

12 CHAIR GOODMAN: Thank you very much, Daniel.

13 So is there anyone else that would like to  
14 give any comments today?

15 Okay. I don't have any hands up.

16 Just as a reminder, the public-comment  
17 period for this very important issue closes  
18 August 25th, so try to get those in to the Bar before  
19 then. And our meeting of the Bar examiners will be  
20 here on August 31st to discuss the two proposals and  
21 make a recommendation. Thank you very much for your  
22 time today.

23 (Whereupon, the proceedings adjourned at  
24 11:53 o'clock a.m.)

25 ---o0o---

1 STATE OF CALIFORNIA )  
2 )  
COUNTY OF SAN FRANCISCO )

3 I, MARY DUTRA, a Certified Shorthand  
4 Reporter of the State of California, do hereby certify  
5 that the foregoing proceedings were reported by me, a  
6 disinterested person, and were thereafter transcribed  
7 under my direction via computer-aided transcription,  
8 and is a true and correct transcription of said  
9 proceedings.

10 I further certify that I am not of counsel  
11 or attorney for either or any of the parties in the  
12 foregoing proceedings and caption named, nor in any  
13 way interested in the outcome of the cause named in  
14 said caption.

15 Dated the 21st day of August, 2017.

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19 \_\_\_\_\_  
20 MARY DUTRA  
21 CSR No. 9251 (California)  
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24  
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